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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-728

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HAROLD FRANKS and JOHNNIE LEE,

*Petitioners,*

v.

BOWMAN TRANSPORTATION COMPANY, INC., et al.,

*Respondents.*

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## PETITIONERS' OPPOSITION TO SUGGESTION OF MOOTNESS

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## PETITIONERS' OPPOSITION TO SUGGESTION OF MOOTNESS

This case is not moot.

Respondent Bowman Transportation, Inc., suggests that this certified class action[1] has become moot, despite the existence of a continuing controversy affecting important rights of class members, because the named plaintiffs' individual rights do not depend on the resolution of the question presented to this Court. The facts are as set forth in Petitioners' brief,[2] and briefly summarized in Bowman's Memorandum Suggesting Mootness. All of these facts were

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[1] The district court formally certified this case as a class action, defined the classes represented by plaintiffs, and provided for notice, on June 28, 1972 and July 14, 1972. (Appendix to Petition for a Writ of Certiorari, A53, A66-A68, A70). The district court's actions fully comport with the requirements of Rule 23(c), Federal Rules of Civil Procedure. Cf. *Board of School Commissioners of Indianapolis* v. *Jacobs*, 420 U.S. 128, 129-130 (1975).

[2] Brief for Petitioners, pp. 5-11.

before the court when it granted the Petition for a Writ of Certiorari.[3]

Principles clarified last term in *Sosna* v. *Iowa,* 419 U.S. 393 (1975), and in *Board of School Commissioners of Indianapolis* v. *Jacobs,* 420 U.S. 393 (1975), refute the suggestions of mootness. The controlling difference between *Sosna* and *Jacobs* was the existence, in *Sosna* alone, of a properly certified and defined class. As a result,

> When the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by the appellant. . . . [T]his factor significantly affect the mootness determination. . . .
>
> Although the controversy is no longer live as to appellant Sosna, it remains very much alive for the class of persons she has been certified to represent.

*Sosna, supra,* 419 U.S. at 399, 401. In contrast, *Jacobs* was moot "*because* the class action was never properly certified nor the class properly identified," 419 U.S. at 130 (emphasis supplied). The instant case, like *Sosna* and unlike *Jacobs,* was "duly certified as a class action pursuant to Fed. Rule Civ. Proc. 23," *Jacobs, supra,* 420 U.S. at 129.

This case fits precisely within the rule for determining mootness announced in *Sosna*:

> [T]here must be a live controversy at the time this Court reviews the case. . . . The controversy may exist, however, between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot.

[3] Petition for a Writ of Certiorari, pp. 5-7.



419 U.S. at 402. Here, a number of class members have a "live controversy" with Respondents with respect to the retroactive seniority issue. Several members of "Class 3"[4] reapplied for OTR jobs pursuant to the district court's decree. Several were hired and still drive for Bowman;[5] their present seniority status is inferior to what it will be if Petitioners prevail here on the merits of the retroactive seniority issue. As a result of their reduced seniority, these individuals are subjected each day they work to terms and conditions of employment tainted by past discrimination. They are unable to compete with full seniority for more desirable runs and shifts; and their income opportunity is diminished by this competitive bidding handicap. In addition, several class members were initially rehired but no longer work for Bowman;[6] their income was decreased during employment and they will be entitled to further back pay if Petitioners prevail. Finally, the reasons given by Bowman for rejection of many class members' renewed applications after the decree[7] strongly sug-

[4] Blacks whose applications for OTR positions Bowman discriminatorily rejected prior to January 1, 1972 (see Petitioners' brief at 10).

[5] See Bowman's Answers to Plaintiffs' Remand Interrogatories, filed May 1, 1975 (N.D. Ga., C.A. No. 15,086), #35 and #36, and Exhibits 5 and 34. Plaintiffs filed those remand interrogatories in the district court in connection with remand proceedings on issues other than that presented in this Court. Interrogatories 35-37 requested up-dated information as to each black OTR applicant denied a job prior to January 1, 1972, and granted re-application rights by the district court. Answer 36 and Exhibit 34 list all such Class 3 members and show which ones were hired; Answers 35, 36 and Exhibit 5 show the current status of such persons or when they were terminated.

[6] See n. 5, *supra.*

[7] Such reasons as "unable to verify experience" and "no tractor-trailer experience" are exactly the same pretexts Bowman used to deny jobs to plaintiff Lee, witnesses Harbor and McLaughlin, and other black OTR applicants in the first place. See Brief for Petitioners at 7-10.

gest continued post-decree discrimination. If any of these persons are adjudged entitled to reinstatement, their seniority status will depend on the outcome here.

Members of the plaintiff class affected by the retroactive seniority issue cannot fully protect their stake by filing a new lawsuit or pursuing the seniority issue from the remand proceedings to a renewed appeal to this Court.[8] Each day they work without their proper seniority, they suffer anew the consequences of past discrimination. No future decision of this Court in some later case can ever lift the yoke of employment discrimination from the days and years that will then have passed.

The suggestion raised by Bowman is one of standing, properly speaking, rather than mootness. The mootness decisions relied upon by Bowman, and similar recent decisions,[9] have involved changes in the factual setting which eliminated the present claim of one party, thus ending the "controversy" necessary for jurisdiction. Here, the underlying facts remain the same, and a number of class members have a present stake in the outcome that is "real and immediate," not "conjectural" or "hypothetical," *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974). Since the case has been certified as a class action, there are presently before the court parties who have standing to present the retroactive seniority issue. This case is not an academic exercise, but a live controversy between adverse parties.

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[8] Under the Fifth Circuit's holding in this case, the district court would be constrained to deny the class members relief.

[9] See, for example, *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115 (1974).



Respectfully submitted,

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